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No. 596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

JOHNINA, INC., a Florida corporation,

Petitioner,

-vs-

MAY SPACH, Trustee in Bankruptcy,

Respondent.

Petition for a Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit.

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Petition for a Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit.

TO THE HONORABLE EARL C. WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, JOHNINA, INC., a Florida corporation, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 21, 1961, and wherein further on the 13th day of September, 1961, a Petition for Rehearing was denied.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 291 F. 2d 619.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on the 21st day of June 1961, and a copy thereof is appended to this petition in Appendix A at p. 19.

On September 13, 1961, the United States Court of Appeals for the Fifth Circuit denied a Petition for Rehearing and a copy thereof is appended to this petition in Appendix B at p. 24.

The instant petition is timely filed (Title 28 U.S.C. Sec. 2101 (c)). The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1), (62 Stat. 928), and 11 U.S.C. Sec. 47(c), (30 Stat. 553 as amended).

QUESTIONS PRESENTED

The determination of jurisdiction to dispose summarily of questions of title to property to which a claim is asserted against that of the bankrupt when such jurisdiction is not consented to depends upon the nature and the validity of such claim.

A bankruptcy court lacks jurisdiction to try in summary proceedings issues as to property held adversely to the bankrupt estate without the consent of the adverse claimant.

The problem is basically the nature in which the adverse claimant raises the objection to the summary jurisdiction of the bankruptcy court when the same is invoked by a Trustee in Bankruptcy utilizing turn over proceedings.

By objecting to a turn over proceeding an adverse claimant usually files a special appearance and a Motion to Quash directed to the turn over order invoking summary jurisdiction of the bankruptcy court, or said adverse claimant may raise the question of the invocation of the summary proceedings by the filing of an answer placing in issue the proper application of summary jurisdiction.

Where a Referee after denying the adverse claimant his right to a plenary suit where the special appearance and Motion to Quash was filed in the following contents and forms:

> "Comes now JOHNINA, INC., a Florida corporation, by and through its undersigned attorneys, Stolar and Muchnick, and files this their Special Appearance to the above-styled cause for the sole purpose of contesting jurisdiction of the Referee in Bankruptcy and as grounds therefore alleges:
>
> 1. That no jurisdiction or process has been had against Johnina, Inc., in connection with the above-styled bankruptcy action.
>
> 2. That the questions raised in the Petition

for Turn-Over Order are questions to which Johnina, Inc., is entitled to a trial by jury.

3. That there is no basis for requiring Johnina, Inc., to submit itself to a summary proceeding, and further it demands to have its rights determined in a plenary action.

WHEREFORE, Johnina, Inc., respectfully requests that the Order to Show Cause hereto fully shown in the above order be quashed." (Record P. 5)

and where the adverse claimant then files an answer to the Turn Over Petition and Order in the following language:

"Comes now Johnina, Inc., a Florida corporation, by and through its undersigned Attorneys, Stolar and Muchnick, and answering the Petition for a Turn Over Order, do allege:

As A First Defense.

1. That the Bankrupts, Hyman Z. Gorin and Doris Gorin, d b/a Don Juan Men's Wear, were Assignees of that certain lease agreement dated September 25, 1950 for the term commencing December 1, 1950 and terminating on November 30, 1960. That the sum of Five Thousand Seven Hundred ($5,700.00) Dollars was due and payable by the Lessee or his Assigns for each year of the said ten-year term.

2. That the said Johnina, Inc., in accordance with the terms of the said ten-year lease, the pertinent parts of which are attached hereto and made a part hereof, was owed the sum of Two Thousand Seven Hundred ($2,700.00) Dollars for the ninth year of said rental, commencing on December 1, 1958, and ending on November 30, 1959, and an additional Five Thousand Seven Hundred ($5,700.00) Dollars for the tenth year rental in the amount of Five Thousand Seven Hundred ($5,700.00) Dollars, commencing on December 1, 1959 and ending on November 30, 1960.

3. That the Johnina Hotel, in an effort to mitigate said damages as a result of the above described lease, did rent said premises from the 17th day of June, 1959 to the 31st day of October, 1960.

4. That the monies presently held as security by Johnina, Inc., are rightfully held by virtue of the rent delinquency of the Bankrupt and damages sustained by breach of said lease in accordance with its terms.

As A Second Separate Defense.

1. That on or about June 5, 1959 that May Spach, the Trustee of the above named Bankrupt Estate, did execute a Trustee's Bill of Sale to the present tenant, Max Richards, and did thereby sell, transfer, and assign to Max Richards, his heirs and assigns forever, all of the

said Trustee's right, title, and interest as Trustee in, and to, the assets of the said Estate of the Bankrupt in bulk, a copy of which Trustee's Bill of Sale is attached hereto and made a part hereof.

2. That the said Trustee is an improper party to the Petition for Turn Over Order, since said Trustee no longer has any right, title, or interest to the assets of the said Bankrupt Estate by virtue of the above Bill of Sale hereinabove set out.

As A Third Separate Defense.

1. That in accordance with the applicable law there is no basis for requiring Johnina, Inc., to have its rights adjudicated in a summary proceeding and states that the Trustee's claim must be determined in a plenary action.

WHEREFORE, JOHNINA, INC., respectfully requests that the Trustee's Petition for a Turn Over Order be denied."

Does the District Court sitting in Review have the right to analyze the entire record and thereby set the matter straight as to the application of summary jurisdiction?

The opinion of the United States Court of Appeals for the Fifth Circuit has maintained, in spite of the Statute, the decision of this Court and its own previous decisions, that the Motion to Quash wherein summary

jurisdiction is attacked, the attack must contain factual allegations to defeat summary jurisdiction; and the adverse claimant is not afforded a second opportunity to present sufficient facts by answer, nor is the District Court sitting in review permitted in spite of the applicable statutes the right to correct, modify or amend the Referee's order erroniously applying jurisdiction.

Thus, the questions presented are:

1. **A party seeking to invoke the jurisdiction of a United States District Court sitting in bankruptcy, whether the said jurisdiction be general or summary, has the burden of establishing to the District Court's satisfaction that the type of jurisdiction sought to be invoked is applicable.**

2. **The sufficiency of pleadings and motions as to their contents and material allegations filed in bankruptcy matters are governed by the requirements of the Federal Rules of Civil Procedure.**

3. **Once an objection is raised (in the form and mode required by the Federal Rules of Civil Procedure), addressed to the Bankruptcy Court's jurisdiction, the burden of establishing to the exclusion of any adverse matter, that the claimant objecting to summary jurisdiction does not have a substantial claim rests with the Referee, the trustee or the receiver. It never shifts to the claimant.**

4. The intent and purpose and effect of Sec. 2(a)(7) of the Acts of Congress relating to Bankruptcy (11 U.S.C.A. Sec. 11(a)(7)(66 Stat. 420) as to the curtailment of the Bankruptcy Court's jurisdiction.

5. The District Courts, when sitting in review of orders entered by Referee in Bankruptcy are possessed with authority and jurisdiction to amend, modify, reverse, reject the same, in whole or in part, and even receive further evidence concerning the matter.

6. The United States Court of Appeals, when sitting in appellate review of proceedings, interlocutory or final, in Bankruptcy, are possessed with authority and jurisdiction to review, affirm, revise, or reverse, both in matters of law and in matters of fact, the proceedings reviewed by appeal.

STATUTES INVOLVED

The pertinent portion of 11 U.S.C. Sec. 11(a)(7)(66 Stat. 420), 11 U.S.C. Sec. 46 (30 Stat. 552 as amended), 11 U.S.C. Sec. 47(a)(30 Stat. 553 as amended), 11 U.S.C. Sec. 67 (30 Stat. 555 as amended), 11 U.S.C. Sec. 96 (30 Stat. 562 as amended), 11 U.S.C. Sec. 107 (30 Stat. 564 as amended), 11 U.S.C. 110 (30 Stat. 565 as amended), General Orders 37 and 47 (General Orders of Bankruptcy adopted by the Supreme Court of the United States) and Rules numbered 7, 8, 12, 15 and 53 of the Federal Rules of Civil Procedure, (28 U.S.C. Sec. 2072 and the Rules thereunder promulgated).

STATEMENT

The instant cause arose during the administration of a bankruptcy estate entitled "HYMAN Z. GORIN and DORIS GORIN, d b a DON JUAN MEN'S WEAR a bankrupt.

The original cause of action was filed in the United States District Court, for the Southern District of Florida, Miami Division, and MAY SPACH was appointed Trustee for the administration of said Estate and qualified by the filing of her bond in the amount required by the Referee.

During the administration of the Estate her attorney obtained a Turn-Over Order addressed to JOHNINA, INC., the petitioner, to show cause why said Florida corporation, the landlord, did not turn over to the said Trustee the sum of Five Thousand Seven Hundred ($5,700.00) Dollars, which represented the security deposit under the lease and which deposit was in effect subject to various and sundry provisions of the lease (R. pp. 26 thru 30).

The security deposit was in the hands of the adverse claimant, JOHNINA, INC., the Petitioner herein, at all times and it was subjected to the aforementioned and designated provisions of the lease. A special appearance and a Motion to Quash was filed on behalf of the Petitioner, (R. p. 5).

The Referee denied the Motion to Quash and ordered this Petitioner to file its Answer. Said Answer was duly and timely filed (R. p. 16).

The Trustee filed a Motion to Quash the said Answer (R. p. 44). At no time did the Trustee join in issue the allegations raised by the Answer filed by the Petitioner. The Referee ordered JOHNINA, INC., to turn over the security deposit (R. pp. 45 and 46).

A Petition for Review was duly filed (R. p. 65). The Certificate of Review was transmitted to the Judges of the United States District Court for the Southern District of Florida, (R. p. 66), and the Trustee filed a Motion to Dismiss the Petition for Review (R. p. 71).

The District Court in the person of the Honorable Emmet C. Choate, United States District Judge, entered its Order of Reversal (R. pp. 72 and 73).

It is of interest to note that the attorney for the Trustee attempts throughout the proceedings before the Referee and the District Court to obtain jurisdiction over an adverse claimant without the consent of the latter by procedural evasion rather than by trial and joinder of issue which would allow the Referee the right to examine the merits of, or the colorability of the adverse claim presented.

The United States Court of Appeals for the Fifth Circuit by implication approved this procedure and analyzed the same in a manner which baffles and astounds the practitioner. That Court held:

> "It appears that the District Court, in entering its order of reversal assumed that the allegations contained in the Answer of Johnina, Inc., were asserted in the Motion to Quash. If they

had been so alleged we would agree with the trial court that the Referee did not have jurisdiction for summary order. However, this is not what is disclosed by the Record before us and we must therefore find that the trial court erred in reversing the order of the Referee retaining jurisdiction over the matter." (*Spach vs Johnna, Inc.*, 219 F. 2d 619 at 621, App. A p. 19).

REASONS FOR GRANTING THE WRIT

The basic problem created by the Opinion of the Court of Appeals for the Fifth Circuit rendered on June 21, 1961, is the contents and sufficiency of a motion addressed to challenge the summary jurisdiction of a bankruptcy court in accordance with the statutory provisions of Section 2(a)(7) of the Acts of Congress relating to Bankruptcy, [(11 U.S.C. Sec. 11(a)(7)), (66 Stat. 420)].

The pertinent statutory provisions do not stand isolated as to the requirements therein contained but must be analyzed in light of the statutory requirements as contained in Sections 23 and 39 of the Acts of Congress relating to Bankruptcy [(11 U.S.C. Sec. 46 and 67); (30 Stat. 552 as Amended), and (30 Stat. 555 as Amended), General Orders 37 and 47, (General Orders in Bankruptcy adopted by the Supreme Court of the United States), and Rules, 7, 8, 12, 15 and 53, of the Federal Rules of Civil Procedure, (28 U.S.C. Sec. 2072 of the Rules thereunder promulgated)].

This Court has never ruled directly upon the method in which an adverse claimant must impose his objection to the application of summary jurisdiction. What form

the said objection must take and the material allegations necessary in the Motion to Quash a procedure which attempts to invoke summary jurisdiction.

This Court has never determined under the prevailing and present statutes whether or not an adverse claimant having once imposed an objection to the general or summary jurisdiction of a Bankruptcy Court in the form and manner approved under the Federal Rules of Civil Procedure and has re-invoked the objection to jurisdiction in an Answer that such procedure is appropriate to preserve the objection raised by an adverse claimant to the general and summary jurisdiction of a Bankruptcy Court.

The basic requirement of preserving objection to the invocation of summary and general jurisdiction of a Bankruptcy Court have been confused and mystified by the Opinion rendered below.

If the Opinion as rendered below is allowed to stand, it has created an amendment to the rules of Civil Procedure by requiring additional allegations to be set forth by an adverse claimant resisting the application of summary and general jurisdiction of a Bankruptcy Court.

It creates in the practitioner a state of utter frustration inasmuch as the Opinion below seeks to establish a requirement in pleading that is not contemplated by the applicable statute, the General Orders, the rules of Civil Procedure and the interpretation rendered by the various and sundry Courts of Appeal and by this Honorable Court.

The Opinion below fails to minutely deal with the ramification and the inter-relationship of the foregoing

statutory and judicial interpretation and leaves the pleader to wonder what is to be expected of him in filing motions addressed to an attack of an application of general and summary jurisdiction in a bankruptcy matter.

The Opinion leaves a hiatus in determining the District Court's authority in reviewing a record presented by a Referee where an objection has been made by an adverse claimant as to the bankruptcy court's summary jurisdiction. It appears that the Opinion below gives vent to the opening of a door to extend and expand the summary jurisdiction of the Bankruptcy Court contrary to the intention of the Bankruptcy Act and the amendments thereto.

The opinion failed to meet a question which this Court has maintained is basic, that is, the party who raises the application of jurisdiction, either general or summary, must prove that the applicable type of jurisdiction sought to be invoked is appropriate | (*McNutt vs General Motors Acceptance Corp.*, 298 U.S. p. 178, 56 S. Ct. 780, 80 L. Ed. 1135; *Lehigh Mining & Manufacturing Co., vs Kelly*, 160 U.S. 327 at 337; 16 S. Ct. 307 at 311; 40 L. Ed. 444; *Nicholas vs Peter Pan Shops*, 256 F. 2d 349, 5th Cir.; *Birmingham Post Co. vs Brown*, 217 F. 2d 127 at 130, 5th Cir.; 11 U.S.C. Sec. 46(b) (30 Stat. 552 as Amended), General Orders 37 and 47, (General Orders in Bankruptcy adopted by the Supreme Court of the United States); Rules 7, 8, 12, 15 and 53 Rules of Civil Procedure; 2 Moores Fed Practice 2d Ed., pages 2327 through 2330) |.

The opinion below recognizes that the District Court in its ruling reversing the Referee would have been correct if the Motion to Quash filed by the adverse claimant,

the Petitioner herein, contained the allegations of the answer subsequently filed. Yet, the opinion failed to analyze this reasoning in light of the provisions of the bankruptcy act which allow a District Judge sitting in review of a Referee's order to amend, modify, revise and correct the same [(*Knetzer vs Larkin*, 176 F. 2d 532, 2nd Cir.; *Matter of Gsand*, 153 F. 2d 10001, 3rd Cir.; *Shapiro vs Tweedy Footwear Corp.*, 131 F. 2d 876, 3rd Cir.; *Equitable Life Assurance Co. of the United States vs Carmody*, 131 F. 2d 318, 8th Cir.; *In re Duval* 103 F. 2d 653, 7th Cir.: *Kowalski vs American Employers Ins. Co.*, 90 F. 2d 476; 6th Cir.; *Byrd Coal Co.*, 83 F. 2d 190, 2nd Cir.; 11 U.S.C. Sec. 67(c)(30 Stat. 555 as amended); General Orders 47 (General Orders in Bankruptcy promulgated by the Supreme Court of the United States)].

The Opinion fails to recognize that the Federal Rules of Civil Procedure are applicable and govern bankruptcy procedural matters. Further where no substantial evidence or lack of law support the Referee's orders they cannot be allowed to stand (*Carter Oil Co., vs McQuigg*, 112 F. 2d 275, 7th Cir.), and thus a District Court may modify a Referee's order (*Matter of J. Rose Millinary Co.*, 93 F. 2d 471, 2d Cir.).

A District Court may reject in whole or in part, a Referee's order (*Green River Jockey Club*, 5 F. 2d 259, 6th Cir.).

A District Judge sitting in review of a bankruptcy Referee's Order is not barred from considering any issue presented by the record even though it was not disputed by or before the Referee but was preserved and not waived

by the party asserting it. (*In re Wilde's Son*, 144 Fed. 2d 972, 2d Cir.).

A District Judge may amend and supplement a Referee's findings (*In re Quaker Room* 9 Fed. Supp. 758).

The opinion below disregards its own directive where it held that a Bankruptcy Court has the duty to examine into its own jurisdiction general and summary, and where objection to the same has not been waived upon review of a Referee's Order. The District Court must make an examination and decide whether summary jurisdiction or general jurisdiction has been appropriately invoked (*Nicholas vs Peter Pan Shops*, 256 F. 2d 349, 5th Cir.).

The Court of Appeals is not vested with the authority to amend or modify the Federal Rules of Civil Procedure inasmuch as Congress in its wisdom and discretion delegated this power to the Supreme Court of the United States, | (28 U.S.C. Sec. 2072)-(63 Stat. 104 as Amended) |.

The Opinion below seeks to establish a modification to the requirements of the sufficiency of a pleading addressed to jurisdiction.

There is no requirement in the Bankruptcy Act even by amendment to the same subsequent to **Cline v Kaplan**, (325 U.S. 97, 65 S. Ct., 155, 89 L. Ed. 97) which requires that an adverse claimant's objection to the application of the summary jurisdiction of a Bankruptcy Court must take a special form in pleading other than the form required by the Federal Rules of Civil Procedure wherein the jurisdiction of the Federal Courts are questioned.

The Opinion rendered by the United States Court of Appeals for the Fifth Circuit if allowed to stand can create nothing but havoc and diversity of rulings throughout the Circuits concerning the application of a bankruptcy court's summary and general jurisdiction and the method to oppose the same by adverse claimants.

The Opinion seeks to require additional allegations and pleadings which are contrary to the concept of raising such question. The Courts have always held that notification of objection to jurisdiction sufficiently alleged in a proper motion is sufficient to put the Court on notice as to a question of the application of its jurisdiction. Thus the Court may make its own investigation as to the propriety of the jurisdictional application sought by the parties seeking to invoke it.

The Opinion strikes this matter of procedure and places the burden upon the adverse claimant to plead and prove that the Court has no jurisdiction either general or summary, in a bankruptcy matter, and to further add salt to the injury the opinion prevents the District Court sitting in review of a Referee to correct the error when the District Court recognizes the same.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the Petition for this Writ of Certiorari should be granted.

Dated this ____ day of December, A. D. 1961.

IRVING M. WOLFF
Attorney for Petitioner,
1204 Biscayne Building,
Miami 32, Florida.

CERTIFICATE OF SERVICE

Service of the foregoing Petition for Writ of Certiorari in the United States Court of Appeals For the Fifth Circuit, had on this _____ day of December, 1961, by forwarding the same to Frank & Weston, Attorneys for the Trustee, May Spach, 1335 Lincoln Road, Miami Beach, Florida, by United States Mail.

IRVING M. WOLFF
Attorney for Petitioner
1204 Biscayne Building
Miami 32, Florida

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18409

MAY SPACH, Trustee,

Appellant,

versus

JOHNINA, INC., a Florida Corporation,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 21, 1961.)

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

TUTTLE, Chief Judge: Following an adjudication of bankruptcy of the estate of Hyman Z. and Doris G. Gorin, doing business as Don Juan Men's Wear, the trustee, appellant here, petitioned the bankruptcy court for a turn over order as to certain monies allegedly belonging to the bankrupt estate and in the possession of appellee. This money, $5700 in amount, was held by Johnina, Inc. as landlord of the property of the premises occupied by

the bankrupt, and was claimed by it to stand as security for any unpaid rentals on the premises.

Responding to the order to show cause why it should not surrender the $5700 on a "turn over" order, Johnina, without alleging any facts to support its motion, filed a special appearance "for the sole purpose of contesting jurisdiction of the Referee."[1]

Whatever may have been the facts, it is clear that upon the hearing of this motion the Referee correctly entered an order overruling the motion and setting down the issue on the merits.

Thereafter Johnina filed its answer on the merits. As a defense it asserted that some $5400 of rent had accrued under the lease and that this amount represented damages actually suffered by it, compensation for which was payable out of the $5700 deposit.

This answer was attacked for being filed too late, and, second, that the defense was "a sham in fact."

Thereafter the case came on for a hearing on the merits. The record discloses that the parties discussed

[1] The grounds for this motion were as follows:
"1. That no jurisdiction or process has been had against Johnina, Inc. in connection with the above-styled bankruptcy action.
2. That the questions raised in the Petition for Turn-Over Order are questions to which Johnina, Inc. is entitled to a trial by jury.
3. That there is no basis for requiring Johnina, Inc. to submit itself to a summary proceeding, and further it demands to have its rights determined in a plenary action."

the lease contract and discussed amounts of alleged past due rent, but it discloses no testimony and no proof on the part of Johnina seeking to establish the truth of its answer. As well as we can understand the action of the Referee, he treated the matter as though Johnina would not be entitled to retain the security even if the facts were proved. However, he simply entered an order directing a turn over of the funds. Thereafter appellee filed its petition for review, asserting (1) the lack of summary jurisdiction, and (2) the lack of evidence to support the trustee's right to the said sum of money. Thereupon the Referee filed his certificate of review with the District Court. In this certificate the Referee stated, correctly we think, that, "the respondent failed to produce any testimony to establish its claim of set off to the claim of the trustee."

Upon its consideration of the matter, the trial court reversed the order of the Referee on the ground, "the Referee did not possess summary jurisdiction in the matter in that the petitioner, Johnina, Inc., did have a real and substantial claim against the security deposit retained by the said Johnina, Inc."

The parties all agree to the controlling legal principles, that is that the trustee is entitled to a turn over order to property held by another if the latter has no real claim to the property, but merely a colorable claim. See *Nicholas v. Peter Pan Snack Shop*, 5 Cir., 256 F. 2d 349, 354. In case there is only a colorable claim the money in question is considered to be in the constructive possession of the

Referee and subject to his summary jurisdiction. See Collier on Bankruptcy, ¶23.03 et seq., ¶70.44.

It is clear that the proof by the appellee, Johnina, that it held the $5700 in accordance with the terms of the lease agreement would not be sufficient to entitle it to retain the sum as liquidated damages, for a provision such as that here involved[2] has been held by the Florida courts to amount to a penalty rather than liquidated damages. *Stentor, Inc. v. Lester*, 58 So. 2d 673, at 675.[3]

Thus the burden was on the landlord to prove the amount of his actual damages, once it was clear that the Referee had acquired jurisdiction over the issue by failure of the appellee, in its motion to quash, to assert any factual basis for its claim. This the appellee failed to do. The record before us shows nothing more than a colloquy between the Referee, counsel for the trustee, counsel for the bank-

---

2 The applicable provisions of the agreement were:

"It is Understood and Agreed that in the event that the Lessee shall . . . fail to perform the terms, covenants and conditions of this lease, or shall surrender or abandon the demised premises or any part thereof prior to the end of the demised term, or shall fail to deliver possession of the demised premises to the Lessor upon the termination of this lease in accordance with the terms hereof, or if the Lessee shall be dispossessed from the demised premise, or if this lease shall be canceled by reason of any default on the part of the Lessee, then and in any such event the full amounts deposited as security aforesaid shall become the property of the Lessor without any claim to said amount or any part thereof by the Lessee, and the Lessee shall have no right of action, claim or demand against said sums of money or any part thereof . . . ."

3 "The fundamental rule recognized almost universally is that when the actual damages contemplated by the parties upon breach are susceptible of ascertainment by some known rule or pecuniary standard and the stipulated sum is disproportionate thereto, it will be regarded as a penalty . . . The prime factor is whether the sum named is just compensation for the damage resulting from breach . . ."

rupt and counsel for Johnina, Inc. (who was not the counsel on this appeal), which was little more than a discussion of the legal points involved. No effort was made by the landlord to tender proof of damages.

It appears that the District Court, in entering its order of reversal, assumed that the allegations contained in the answer of Johnina, Inc., were asserted in the motion to quash. If they had been so alleged we would agree with the trial court that the Referee did not have jurisdiction for summary order. However, this is not what is disclosed by the record before us, and we must, therefore, find that the trial court erred in reversing the order of the Referee retaining jurisdiction over the matter.

In the appeal here Johnina does not contend that the Referee erred in its determination on the merits. We conclude, therefore, that the order of the trial court must be reversed. It is not clear whether, upon reversal, the Referee has the authority to grant a new hearing on the merits of the trustee's claim to the $5700 deposit and of Johnina's claim to retain a substantial part of it for rents actually due and unpaid at the time of bankruptcy. We, therefore, deem it appropriate to remand the case to the trial court for a vacation of its order and a remand to the Referee for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

JUDGMENT

Extract from the Minutes of June 21, 1961

No. 18409

MAY SPACH, Trustee,

versus

JOHNINA, INC., a Florida Corporation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it hereby, remanded to the said District Court for a vacation of its order and a remand to the Referee for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, JOHNINA, INC., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * *

APPENDIX C

FILED 13th day of September, 1961
EDWARD W. WADSWORTH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,409

MAY SPACH, Trustee,
Appellant,

v

JOHNINA, INC., a Florida corporation,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(September 13, 1961)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, CAMERON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same, is, hereby DENIED.